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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 511.

LINUS PAULING,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Grant of Certiorari to the United States Court of Appeals for the Eighth Circuit.

I.

"QUESTIONS PRESENTED

"1. Whether the rule of New York Times Co. v. Sullivan . . . is to be extended to petitioner, who is not a public official or public employee, but has expressed his views on matters of public concern, where the libel relates to his involuntary appearance, under subpoena, before a subcommittee of the United States Senate." Petition, p. 2.

Except for the substitution of the future for the past tense, and the omitted argumentative statement of the

Times rule, respondent agrees that there is presented by this record the first of the two "Questions Presented," quoted above from Petition, p. 2.

Respondent does not agree, however, that certiorari should be granted on that account.

This court has now granted the writ in Associated Press v. Walker, No. 150, and in Curtis Publishing Company v. Butts, No. 37, and the questions certain to be resolved in those cases, and especially in A. P. v. Walker, will resolve the above question in this case.

The extent of Pauling's vast activities as a volunteering "public man" is adequately demonstrated by the opinion below and by the testimony of Mrs. Pauling as set out in the Supplemental Record below (S. R. 6, et seq.). It would seem that if the rule of *New York Times* has application to any other "categories of persons" (as the court intimated in the already-famous footnote 17) than occupants of and candidates for public office, then of such categories of persons the category in which the record places Dr. Pauling must be the prototype.

We can imagine no meaningful distinction anent such categories, as between Dr. Pauling and General Walker, their activities and their consequent assumption of the risk of inaccurate reporting (to use an antique phrase). Neither had any personal axe to grind. Neither concurrently held any public office. Both were men of prominence and recognition with histories of leadership, and a conviction of obligation flowing from their positions. Both were dismayed by the conduct of their government. Both took a public stand intended to arouse public interest,—nay, public action,—on the issues to which they had dedicated themselves. In effect, both invited public discussion of themselves and their activities, in order to further the publicity of their causes.

Tros Tyriusque mihi nullo discrimine agetur: the law, like Dido, applies itself alike to good guys and to bad guys.

In view of the grant of certiorari in A. P. v. Walker, and the inevitable resolution of the seemingly identical question presented in that case, thoroughly researched in the opinion below, in *Walker,* and in *Butts,* there appears to be no reason, under 19.1 (b) of the rules of this Court, for the grant of certiorari in this case also, to review again the same question.

II.

"QUESTIONS PRESENTED

"2. If so, whether petitioner has already proved, or is entitled to an opportunity to prove 'actual malice' under the new rule," etc.

Respondent does not agree that the second "Question Presented" quoted above from Pet., pp. 2 and 3, is properly raised by the record in this case.

a.

Petitioner Not Entitled to Another "Opportunity to Prove Actual Malice".

Petitioner argues (Pet. 20-21):

> "No plaintiff can be held at his peril to a rule that he must anticipate a novel extension of the law and must direct his evidence and instructions to meet an extension which no court has yet made and which the trial judge had already rejected."

No authority is given for this extraordinary statement.

In every appealed case the application of the law is disputed; otherwise there would be no appeal. Petitioner's proposition would mean that there never could be

an end to litigation; for every decision of every court is made *for the first time* on the precise facts, authorities and arguments then before it.

The assertion is, in the last analysis, a plea of ignorance of the law, which is in violation of the firmest of all legal presumptions:

> "Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it." South Ottowa v. Perkins, 94 U. S. 154, 158, 23 L. Ed. 260, 269.

Neither can petitioner find comfort in the ruling of the trial judge that *New York Times* was inapplicable; for it was the petitioner, himself, who prevailed upon the Court to so rule. F. W. Woolworth v. Contemporary Arts, 344 U. S. 228, 231, 73 S. Ct. 222, 224.

The announcement in *Times* of the principle that the First Amendment of the United States Constitution governs state-law libel suits arising out of public discussion of public issues, not only preceded this trial, but the announcement had been explicitly brought to petitioner's attention.

Before the commencement of the trial respondent sought leave to amend its amended answer to plead that the rule of the New York Times case was applicable to the claim of Professor Pauling for the very reason ultimately adopted by the Court of Appeals. Petitioner objected to the amendment, and the trial judge at first denied leave to file the amendment, on the ground that the rule of the New York Times case was not applicable to Pauling (Pet. p. 10). But before making up the charge, the Court permitted the amendment to be made "to preserve the point" (R. 135, 136), and the amendment appears at R. 30-31. The new matter pleaded reads as follows:

> "19. Further answering, defendant states that plaintiff voluntarily sought public expression of his

> views on national policy and invited public comment thereon, and that under the Constitution of the United States as interpreted by the United States Supreme Court on Monday, March 9, 1964, in New York Times and Abernathy v. Sullivan, 32 Law Week 4184, he cannot recover for libel arising out of such comment unless in addition to being defamatory and false such comment was based upon actual malice."

Thus there can be no doubt that before commencing the trial, as well as before offering his requested instructions, petitioner was aware of the decision and of defendant's assertion that the New York Times rule was applicable to his case.

Furthermore, since the amendment gave notice of the availability of the opinion in published form, petitioner cannot deny that he was apprised of the constitutional predicate of the New York Times rule and the broad scope of its applicability, which was clearly stated in the opinion. Indeed, this Court, while deciding only the case before it, had given clear warning that the rule of law would be applied wherever the principle announced might require.

In footnote 23 the court stated:

> "We have no occasion here to determine how far down into the lower ranks of Government employees 'the public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included.*"

Petitioner speaks of "respondent's *Times* defense," "to preserve the defense on appeal," "the *Times* defense," and "respondent's *Times* argument" (Pet. 19).

But this is a total misconception of the *New York Times* rule, which puts the burden of proof *on the plaintiff* (l. c. 279, l. c. 726):

> "The constitutional guaranties require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves* that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of whether it was false or not."

In Rosenblatt v. Baer, 383 U. S. 75, 86 S. Ct. 669, Baer had recovered a verdict in a civil libel action which the New Hampshire Supreme Court on appeal affirmed on the ground that the rule of the New York Times opinion was inapplicable. This Court held the rule applicable on the record made, reversed the judgment, and remanded the case for a new trial, saying (l. c. 677):

> "The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the New York Times rule. Moreover, even if the claim fails within New York Times, the record suggests respondent may be able to present a jury question of malice as therein defined. *Because trial was had before New York Times,* we have concluded that we should not foreclose him from attempting retrial of his action."

The plain implication of this holding is that if the trial had taken place *after* the New York Times decision Baer would have been foreclosed from a new trial even though he had prevailed both in the trial court and in the appellate court.

Pauling's case, unlike Baer's, was tried after the New York Times decision and in full knowledge of it, of its holding, and of the defendant's position that Pauling was in one of the "categories of persons who would be included" within it.

Also, as the Court of Appeals pointed out [Pet. 21 (b), 22 (b)], Pauling's case is distinguishable from Baer's

on the additional ground that Baer had obtained a verdict and judgment below, whereas Pauling had lost and was an appellant. The significance of this additional distinction between Baer's case and Pauling's lies in the rule of law that while an appellee may advance in the appellate court any theory which will sustain the judgment below, an appellant, on the other hand, is limited to urging on his appeal the same theory of liability or defense which he pursued in the trial court. Helvering v. Gowran, 302 U. S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224; Helvering v. Wood, 309 U. S. 344, 348-349, 60 S. Ct. 551, 84 L. Ed. 796.

In Thomas v. Taylor, 224 U. S. 73, 32 S. Ct. 403, 406, this court held:

> "Besides, judgment cannot be reversed upon the mere suggestion that, upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result."

Under the rationale of the holding in Rosenblatt v. Baer, therefore, the petitioner has had his day in court, and is not entitled to another. The case he pleaded and proved and the relief he sought on that day must determine his ultimate rights. The New York Times rule was applicable, and his proof simply was not sufficient to permit the only relief he sought. The Court of Appeals so held [Pet. 21 (b)]. Unless manifestly erroneous, this determination disposes of the case.

b.

Petitioner Is Bound by His Theory Below: That Malice Was Irrelevant.

Malice, as this Court pointed out with considerable care in the New York Times opinion, is quite a different mat-

ter from malice as it was defined in the Alabama law (l. c. U. S. 283, S. Ct. 727). The prior Missouri law is in accord with that of Alabama except that punitive damages must be separately found in the verdict (Mo. R. C. P. 71.06). The Missouri definition of malice is most aptly stated in Farley v. Evening Chronicle Publishing Company, 113 Mo. App. 216, 87 S. W. 565, 569, as follows:

> "... The word 'malice' has been declared by an eminent jurist rarely to have any meaning in law, except a misleading one. Justice Stephen, as quoted in Newell, Slander & Libel (2d Ed.), p. 317. Another judge has deplored the use of the word, and the maintenance of the doctrine that malice is essential in cases like this (Lord Bromwell, in Abrath v. R. R., 11 App. Cas. 253), because malice, though always insisted on in theory, is dispensed with in every comprehensible sense. Only legal malice is exacted, and on analysis this sinks into a myth or fiction; for so much malice as is necessary to afford compensation for actual damage is inferred from the fact that a false writing was published concerning the plaintiff, although in truth the publisher felt no ill will, and believed he was telling the truth. This result eliminates malice from actions for libel, as a practical factor, save as a reason for awarding more than compensative damages or overcoming the defense of privileged communication ..."

In accordance with the foregoing statement of the law, petitioner took the constant and positive position from one end of the trial to the other, and as well on appeal* that, as far as the question of defendant's liability to the petitioner is concerned, there was no occasion for the jury to make any finding at all with respect to malice of any

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* Initial Brief of Appellant in the Court of Appeals does not even mention *New York Times*. Cases cited, Point IV.

sort—presumed, implied, fictional, actual or per-New York Times.

His petition in this Court now states (Pet. 9):

> "*He* [petitioner in his complaint] *alleged actual malice,* and sought compensatory and punitive damages" (R. 12).

This is in error, for the only mention of malice in the complaint was (R. 12):

> "13. The aforesaid malicious, false, dafamatory, and libelous publication damaged plaintiff in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00)."

That the malice petitioner referred to was not actual malice, and especially not actual malice in the New York Times sense, but was the "inferred" "legal malice" described in the Farley opinion, is simply incontrovertible on this record. His position in this respect is shown in:

1. Plaintiff's Motion for Summary Judgment (R. 27), which postulates no finding of malice.

2. Plaintiff's Motion for Directed Verdict as to Liability (at the close of defendant's case) (R. 29), which postulates no finding of malice.

3. Plaintiff's Motion for a Directed Verdict as to Liability (at the close of all the evidence) (R. 29), which postulates no finding of malice.

4. Plaintiff's Refused Instruction A (R. 153), which would direct a verdict without any finding of malice.

5. Plaintiff's Refused Instruction E (R. 156), which ends: "and such evidence [of actual malice] may be considered by you *solely in aggravation of punitive damages.*"

6. Plaintiff's Motion to Set Aside Verdict and Enter Directed Verdict for Plaintiff as to Liability (R. 33), which postulates no finding of malice.

7. Motion to Set Aside Verdict and to Grant a New Trial, Items 3, 4, 5, 21, 23 and 25, which request a new trial on the theory that liability of respondent was obligatory, irrespective of any finding of malice, and Items 7 and 10, which assert error in refusal of Instructions A and E, supra.

8. Exceptions of counsel during make-up of charge (R. 149-150, at which the following took place):

> "The Court: . . . Now we are down to this matter of malice. I think in this kind of case we will have to use the long form . . .
>
> "Mr. Green: We object, of course, to any instructions along this line. We object to this because it is not our theory . . ."

9. Peremptory instruction to find for plaintiff on mere fact of publication, given at petitioner's request (R. 167, middle), but made applicable only if jury found publication charged violation of 2 U. S. C. 192, which petitioner claimed was true as a matter of law (R. 153, 154).

10. Brief of Appellant, Point I, p. 16, which alleges error in failure to give summary judgment and peremptorily instruct, without reference to malice.

Had the trial court found New York Times applicable to Pauling, he would have had no choice, under petitioner's theory and under his requests to charge, but to have dismissed his action, or to have directed a verdict against him. This is because New York Times predicates an affirmative showing of malice (in its special sense) and *petitioner refused from A to izzard to submit any such issue.*

This was a civil action, and petitioner was plaintiff. The Court was under no compulsion to try the petitioner's case for him, willy-nilly, as he might be, say, in the case of a criminal defendant.

Petitioner must stand or fall here on the only theory he presented below,—that he was entitled to recover *as a matter of law without showing malice.*

In the Matter of Linda Coal and Supply Company, 255 F. 2d 653, 656-657, 3rd Cir., C. C. A., it was said:

> "But a question, differing somewhat from the one just considered, persists. That is whether a party who has expressly relied on one theory is entitled to an adjudication at the trial level on any other theory which might afford relief on the same evidence. The general though not inflexible rule, dictated by the desirability of finality of judgments and seeing an end to litigation, is that a party is bound by and to the theory upon which he presents his case. . . . On the other hand, the reason for holding a litigant to his announced theory becomes more compelling as the litigation proceeds to advanced stages . . ."

Or, as this court held in Virginian Railway Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529:

> "After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

The Court of Appeals having found that Pauling was subject to the requirement of New York Times that he prove malice in the sense of knowing falsehood, and he (although fully informed as to the existence and significance of the opinion) having refused to submit any such issue, the judgment for defendant must necessarily be affirmed.

* * * * * * *

As it was actually tried, the case below did not involve the law of *New York Times.* This is because that is the way petitioner wanted it. At petitioner's instance, the

case was tried on the pre-Times Missouri law, over respondent's objection.

The trial court acceded to petitioner's request to apply the Missouri law rather than the *Times* law.

Now, there developed differences of opinion of what the pre-Times Missouri law required, in the way of admissibility of evidence, instructions to the jury, *et cetera.*

The principal difference lay in petitioner's insistence that malice must be conclusively presumed from the pleadings and that under no hypothesis was *malice vel non* to be submitted to the trier of the fact issues, save only for consideration *in aggravation of punitive damages* (Instruction E, R. 156, etc.)

Whether the trial court ruled correctly in applying the pre-Times Missouri law in rulings on evidence or instructions is of no consequence in this court; for the premise of the second Question Presented is, *"If so"* (Pet. p. 2), *i. e.*, if the rule of New York Times applies.

If the rule of New York Times applies, then in considering questions of procedural errors hanging upon an asserted misinterpretation of pre-Times Missouri law (which by the hypothesis does not apply), the Court of Appeals would have been deciding a moot argument.

The fundamental gap in petitioner's claim here is his utter refusal below to recognize the rule of *New York Times,* requiring the submission of malice as a fact issue.

How, when petitioner himself refused to submit a finding on the issue of malice, can the trial court be found in error in the *manner* in which the issue was submitted? Or, more precisely, how can the Court of Appeals be convicted of error for a failure to rule on the question of whether an issue was properly tried, if the issue was never submitted by the complaining party? Petitioner did not want to have, and fought, bled and died against

having, any kind of jury trial at all on the question of malice as a requisite of liability, or, for that matter, on the question of liability, itself. What he wanted, and *all he asked for,* was a summary judgment or directed verdict: a judgment on liability as a matter of law and to restrict the jury trial to damages alone. If New York Times applies, he could not have the only thing he asked for, and the judgment for defendant, being the only judgment possible under the record he made, must stand.

Thus, this record does not present here the question (Pet. 2):

> ". . . whether petitioner has already proved . . . 'actual malice'."

c.

Malice Was Not Proved Anyway.

While, for reasons expressed under II b, supra, we deny that the question, of whether actual malice was proved, is presented by this record, it may be useful to the court to point out that malice, in the New York Times sense, was not proved anyway.

Under the New York Times rule "malice" means "actual malice", and even "actual malice" has a distinct and different meaning. The Court held (376 U. S. 279, 84 S. Ct. 726):

> "The constitutional guaranties require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made 'with actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The definition of malice in New York Times thus does not admit of the inclusion of *ill will* as a constitutive

element. Even so, this court nevertheless took occasion, in Garrison v. State of Louisiana, 379 U. S. 64, 73, 85 S. Ct. 209, 215, to repeat in explicit terms that malice under New York Times means only knowing or reckless falsehood, irrespective of ill will. The Court there held:

> "Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth . . ."

Thus while two of the three alleged "following facts," i. e., items (a) and (c) of the second Question Presented (Pet. 2-3), if proved, might have some bearing, respectively, upon the truth of the publication, or upon the publisher's hatred or ill will, they are of no value to the court in determining whether the plaintiff made out a case of malice under *New York Times.*

The sole and only evidence submitted by petitioner which could be said to be in any way relevant to the determination of whether petitioner sustained his burden of showing this publication to have been a deliberate falsehood or uttered with reckless disregard of the truth, is the bare unexplained out-of-context statement of the publisher at pages 14 and 15 of his deposition (R. 132): "We felt he was about to be cited; he wasn't" (R. 132, quoted in the Petition, p. 6, p. 14).

The petition does not explain, however, that this quotation was read in petitioner's *rebuttal,* nor that in his case *in chief* petitioner had read from the same deposition of the same witness the following (R. 46-47):

"Mr. Evans: Now I want to refer to pages 10 and 11 of the deposition:

"Q. I direct your attention to the second sentence in the sixth paragraph of the editorial entitled 'Glorification of Deceit', which is as follows: 'Pauling contemptuously refused to testify and was cited for contempt of Congress.' Do you find that in there?

"A. Yes. I see the sentence.

"Q. Was that true at the time that you wrote it?

"A. *I believed it to be true, but I found out later he had not been cited for contempt. I was in error at that time, and when Pauling wrote to me and called that to my attention, I published in full his letter to us calling attention to the correction, together with a letter of Senator Dodd which appeared in the Washington Post on the same subject . . . to which he referred in his letter, yes. I am sure you have the retraction of our statement of regret for the inadvertent error in your files.*"

What Amberg said at pages 14 and 15 of the deposition was intended to be merely a repetition of the earlier statement made at pages 10 and 11: "I believed it to be true, but found out later that he had not been cited." He stated: "I think I already told you that" (R. 132). ". . . this is the fourth time I mentioned it . . ." (R. 133).

That it was so understood by the plaintiff is clear from the fact that the first statement was what he offered in his case in chief, and the latter, on which he relies here, was offered only among other offers in rebuttal (R. 132, 133).

A plaintiff-appellant is bound on appeal by the theory he urged upon the court and jury below. Virginian Railway Co. v. Mullens, 271 U. S. 220, 48 S. Ct. 526, 70 L. Ed. 915, supra.

Petitioner's position and proof below was that respondent had made a mistake,—not that he published a deliberate

falsehood,—and that deliberateness was totally irrelevant to the question of liability; since liability, he claimed, existed as a matter of law. It was petitioner, not respondent, who read into evidence at the beginning of his case (R. 48), the statement of the author of the editorial: "I believed it to be true, but I found out later he had not been cited for contempt."

The attempted rebuttal (of what, it was not clear) offered was as follows:

> Mr. Evans (Reading) "Q. What information did you have with regard to the truth or falsity of this statement which we previously discussed at the time you wrote the editorial? Now, that's the statement that Pauling contemptuously refused to testify and was cited for contempt of Congress?"
>
> "A. I think I already told you that."
>
> "Q. You had no other information?"
>
> "A. I don't know what other information I had. I am trying to locate that. I am telling you this now: this is the fourth time I mentioned it, the sentence is technically in error."
>
> "Q. The sentence is what?"
>
> "A. Technically in error. He had not been cited for contempt of Congress. We felt he was about to be cited, he wasn't."

It is pretty evident, taking the whole of the petitioner's own evidence together, that Amberg's deposition does not rise to the requirement of knowledge of falsity or reckless disregard of truth called for by the rule of *New York Times*, and there is nothing else whatever in the record to rely on. *Washington Post Co. v. Keogh*, 365 F. 2d 965.

This also is what the Court of Appeals held, and there is no record basis for disturbing this finding.

As for petitioner's categorical statement "(a)" (Pet. 2), it is enough to say again that there is no such *crime* as

"contempt of Congress";* and as for the categorical statement (c) (Pet. 3), it suffices to say that the charges made were denied below and are still denied, and that the jury evidently did not believe them. The juxtaposition of Exhibits 8 and 5, the alteration of the size of Exhibit 8, and the deletion of the context of the cartoon (which shows conclusively that the "Commy" could not be Pauling, but represented those who telephoned about Pauling), Supp. Rec. p. 33, after the falseness of similar treatment in appellant's brief had been called to petitioner's attention in the Court of Appeals, seems to us *infra dignitatem.*

However this may be, neither (a) nor (c) are factors in assessing malice under the New York Times rule. Rosenblatt v. Baer, supra.

CONCLUSION.

It follows that neither for the settlement of the law nor for the vindication of a private right should the writ be granted on this petition.

Respectfully submitted,

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* No such words appear in 2 U. S. C. 192.